

U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 04/04/2001

In the Matter of: *
*
Russell P. Everitt *
Claimant *
*
v. *
*
Stevedoring Services Company *
Marine Terminals *
Employer/Self-Insured *
and *
*
Homeport Insurance Company *
Majestic Insurance Company *
Carrier *
and *
*
Director, Office of Workers' *
Compensation Programs *
U.S. Department of Labor *
Party-in-Interest *

Case Nos.: 2000-LHC-231
2000-LHC-1170/1171
OWCP Nos.: 14-126650
14-116045
14-123192

APPEARANCES:

Mary Alice Theiler, Esq.
For the Claimant

Richard Slagle, Esq.
For SSA/Homeport

Raymond H. Warns, Jr., Esq.
For Marine/Majestic

Matthew L. Vadnal, Esq.
Jay Williamson, Esq.
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on October 17, 2000 in Seattle, Washington, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, EX for an exhibit offered by SSA/Homeport and RX for an exhibit offered by Marine Terminals/Majestic Insurance. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

<u>Exhibit No.</u>	<u>Item</u>	<u>Filing Date</u>
CX 53	Attorney Theiler's letter confirming the post-hearing schedule	11/20/00
CX 54	Claimant's brief	12/14/00
DX 1	Director's brief	12/14/00
EX 27	SSA/Homeport's brief	12/14/00
RX 26	Marine Terminal/Majestic Insurance Company's brief	12/14/00
CX 55	Curriculum Vitae of Dr. Stuart L. Du Pen	12/29/00
CX 56	Attorney Theiler's letter filing the	12/27/00
CX 57	Statement of Account from the Swedish Medical Center, dated January 4, 2000, relating to the Claimant	12/27/00
EX 28	Attorney Slagle's comments on CX 57	01/02/01

The record was closed on January 2, 2001, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.
2. Claimant and the Employers were in an employee-employer relationship at the relevant times.
3. Claimant suffered injuries in the course and scope of his employment on March 25, 1994, August 5, 1996 and October 14, 1997.
4. Claimant gave the Employer notice of the injuries in a timely manner.
5. Claimant filed timely claims for compensation and the Employers filed timely notices of controversion.

The unresolved issues in this proceeding are:

1. Whether Claimant's current condition is causally related to his maritime employment.
2. If so, to which injury is the condition causally related.
3. The nature and extent of his disability.
4. Entitlement to an award of medical benefits and interest on past due benefits.
5. Responsible Employer.
6. Applicability of Section 8(f).

Summary of the Evidence

The March 25, 1994 Injury Report reflects that on that date Russell Patrick Everitt ("Claimant" herein) was working as a so-called "lasher" on the waterfront and he had duties of lashing forty foot containers in Bay 2 on the **S.S. Empress Heaven** at the Port of Seattle, a maritime facility adjacent to the navigable waters of Elliott Bay and Puget Sound where the various stevedoring firms employ longshore workers to load/unload cargo from ocean-going vessels. Claimant injured his back while in the process of tightening the turnbuckle when the heavy turning bar slipped. The injury was witnessed by a co-worker, Keith Head, and Claimant reported the injury to Kim Farrison. David Williams was Claimant's foreman at the time. Claimant went to the Covington Medical Park for evaluation and treatment of his back pain. The Employer at that time was Stevedoring Services of America ("SSA") and its

Carrier was Homeport Insurance Company. Claimant continued to work until April 9, 1994 and Claimant filed the appropriate injury report, **i.e.**, Form LS-201, on or about April 10, 1994. (CX 29 at 68-73)

Dr. Joseph R. Smith examined Claimant on March 28, 1994, at which time the doctor took the following history report (CX 9 at 127):

SUBJECTIVE: The patient is a 44 year old white male who strained his left lower back Friday after twisting a cable. The patient is a longshoreman and was twisting a cable at work on Friday. He felt his back twisted. The symptoms began to worsen and become noticeable on Saturday and Sunday. He is now complaining of pain across the lower back, especially the left side, some buttocks tenderness with occasional radiation into his left leg into his ankle and some topical numbness or sensation of numbness over the left thigh. No previous history of any problems of this nature except for some occasional strains that possibly do not even require a physician's attention. He has not had any problems to his lower back.

Dr. Smith examined Claimant, and after reviewing his x-rays (CX 9 at 128) which showed "some narrowing between L5-S1," gave his assessment as (**Id.**):

1. Lumbosacral spine strain;
2. Sciatica.

The doctor prescribed the following plan (**Id.**):

Ice, heat, bed rest, Vicodin #20 1-2 every 4-6 hours for pain, Flexeril 10 mg p.o. t.i.d. p.r.n. muscle strain and spasm and Motrin 60 mg p.o. three times a day with food. Watch for any exacerbation of colitis while on Motrin. The patient has a past medical history of colitis. Recheck on Thursday. Plan would be to schedule physical therapy if the patient seems to be responding. If little change or any worsening of symptoms, may consider CT to rule out a contribution from a disc. The patient is to follow-up sooner if any problems.

Dr. Smith saw Claimant in follow-up on April 1, 1994, at which time the doctor's impression was a lumbosacral strain. Claimant advised the doctor that he would be seeing Dr. James M. Russo, Jr., an orthopedic physician, on April 5, 1994. (CX 9 at 129)

Dr. Russo sent the following letter to Dr. Smith on April 5, 1994 (CX 10 at 131-132):

"I saw your patient Russell Everitt in the office today. This is a pleasant 43-year-old white male who injured his back at work on 3/25/94. He was tightening a turn buckle and twisted his back. He developed low back pain and almost immediately pain into the left leg as far as the posterior calf. He was seen a couple of times at the ICC and ultimately referred here. He has had one other back injury in the distant past but to his knowledge never has experienced left leg pain. He is currently taking Vicodin, Flexeril, ibuprofen and has continued to work despite increasing pain. He feels that he has to work because of some union issue. He also has ulcerative colitis and takes Prednisone for that. He denies any bowel and bladder problems, denies weakness. Valsalva's maneuvers do not appear to increase pain.

"PHYSICAL EXAMINATION: He can flex to about midtibia level with pain experienced in the left buttock. He walks on his heels and toes with some discomfort but no weakness. Strength is intact and symmetrical throughout. Reflexes at knee and ankle level are brisk and symmetrical. Straight leg raising on the right causes some cross-over pain to the left buttock and straight leg raising on the left causes pain in the left thigh. He has a positive bowstring sign with proximal migration of the pain on popliteal squeezing.

"X-RAYS of his lumbar spine were reviewed. He has 6 lumbar vertebral bodies. The 4/5 segment appears to be markedly narrowed and degenerate with anterior spurs. The "5-6" segment shows marked degeneration with disk space narrowing and anterior spur formation. The "6-1" segment shows a milder degree of narrowing.

"He appears to have an HNP with involvement of the S1 nerve root. I advised him as you did to try to take some time off work but apparently this is just not possible for him at this specific time. I have discontinued the ibuprofen and added Toradol to take during the day. The Vicodin is to be taken only at night. He is to use ice as he has been instructed and we will simply have to check him again in 2 more weeks. I told him that there is a good chance he will recover with conservative treatment but continuing work in the capacity he is, is probably detrimental and he must understand that. We will check his progress in 2 weeks. I will keep you informed of how things go. Thanks for allowing me to be of assistance in the care of your patient," according to the doctor.

Claimant's lumbar symptoms persisted and he finally stopped working on April 9, 1994 and, as of April 19, 1994, Dr. Russo recommended "an MRI done to evaluate this condition." (CX 10 at 133) That diagnostic test took place on April 22, 1994 and Dr. Paul M. Chikos, the radiologist, gave the following impression (**Id.** at 134-135):

1. There are six, nonrib-bearing lumbar vertebral bodies, and for the purposes of this report, the reference to the last mobile segment is L5-S1.

2. The L4-5 intervertebral disk is degenerated, with decreased signal intensity on the T2 weighted images and loss of disk space height with osteophytic spurring. There is diffuse, annular bulging, and there may be an associated central disk herniation at L4-5. This touches the anterior thecal sac. The thecal sac itself is very compressed from vertebral body L4 downward due to a large amount of epidural fat. This is consistent with epidural lipomatosis.
3. There is some mild disk degeneration and annular bulging at L5-S1.
4. There is some very mild annular bulging at L3-4, according to the doctor.

Dr. Russo saw Claimant four days later to discuss the results of the MRI and the doctor prescribed "a series of epidurals at the 4-5 level to see if we can effectively deal with this man's pain." Dr. Russo kept Claimant out of all work "until he gets further resolution of his leg pain." (**Id.** at 136) Those injections were performed on April 27th, May 5th and May 12th, 1994. (**Id.** at 137-139)

As of May 27, 1994 Claimant was "doing quite a bit better," "no longer has any leg pain" but "still has some backache." Claimant advised the doctor that he was "back at work pretty much at full duty" and the doctor concluded that Claimant "seems to have had a very nice response" to the treatment plan." (**Id.** at 140) The Carrier's Forms LS-206 reflect that compensation benefits began on April 9, 1994 (CX 5 at 72) and ended on May 7, 1994, and were paid at the weekly rate of \$303.16 based upon his average weekly was of \$454.72. (**Id.** at 74)

Dr. Russo next saw Claimant on July 6, 1994, at which time the doctor noted (CX 10 at 141):

"The patient was back in the office today. He continues to have some back and left leg pain. He believes driving the semis is a real major provoker of his symptoms, and he requested from us and was given a slip limiting him from that type of work for two months. At the present time, he is working full time. He will then come home and take a pain medication to get him through the night, and although that is not ideal, I think that taking a single analgesic at night may be the best that we can do for this man while we try to give it additional time. He is currently having pain in the back, but more uncomfortably in the leg.

"EXAM: Tension signs are slightly positive. Neurologically he remains intact.

"PLAN: We switched him to Tylenol with codeine and have told him

that we will be comfortable with one a day. We will check him back again in about six weeks," according to the doctor.

Dr. Russo next saw Claimant on August 24, 1994, at which time the doctor reported (CX 10 at 141):

"The patient was back in the office today. He is really doing reasonably well. He still has soreness in his back but a very rare leg pain. At work he has been relieved of driving the semi trucks and this has made a very big difference to him in terms of his pain levels. He is not really having any problems at all with activities of daily living and recreational life. He says it is really no problem for his employment if he is permanently restricted from semi's.

"EXAM: He has just a hint of buttock pain with straight leg raising on the left. His neurological is otherwise unremarkable. Compared to when this started back in April, he is really doing a lot better.

"I think at this point he can return on a prn basis. We have given him a note permanently restricting him from driving semis'," according to the doctor.

Dr. Russo saw Claimant on September 8, 1994 and September 14, 1994 and, as Claimant "has had a significant increase in his back and leg pain," the doctor agreed that another course of epidurals might be beneficial. (**Id.** at 142) These were performed on September 14th, 22nd and October 4, 1994 (**Id.** at 143-145) and the doctor reported on October 26, 1994 that the "last set of epidurals didn't give him any relief at all."

The doctor cautioned Claimant on over-medicating himself just to be able to do yard work on the weekends and the doctor advised that he should rest his body on the weekends "and avoid these 'optional' activities." (**Id.** at 146)

Claimant "continue(d) working for obvious financial reasons" and, on December 6, 1994, he advised the doctor that he should shortly be joining the union and "will have medical coverage to have his back taken care of." (**Id.** at 147)

The next medical entry is the April 28, 1995 report of Dr. John E. Dunn, also an orthopedic surgeon, and the doctor, who examined Claimant at the Carrier's request, sent the following letter to the Carrier (CX 11 at 150-151):

"This 45-year-old man was injured while working for Pacific Maritime as a longshoreman on 3/25/94. He had had a past history of having had back pain previously. About ten years ago he was off work for six months with a low-back pain that went away completely. Over the years he has been able to be physically active without

troubles. The injury on 3.25.94 occurred when he twisted and developed low-back pain. It was worse the next day.

"TREATMENT:

He was off work about one month. He is doing his regular work now. He has had six epidural corticosteroid injections. He has not had a corset or chiropractic adjustments. He has not had physical therapy or exercises. He has had various medications including anti-inflammatories, which he stopped taking because of ulcerative colitis; Flexeril, which he takes occasionally; and various pain medicines, currently Darvocet, two tablets a day.

He continues to have pain in his back and in his left leg. The pain goes posteriorly in his leg to his Achilles area. It can be gone some of the time. He has numbness anterolaterally on his left thigh. This seems to be in a different area from where his leg pain is. He feels pain in his left buttock. His leg bothers him more than his back. He is worsened by walking, to some degree by sitting, and by lifting and bending. He has no right leg symptoms. He has no groin or bladder symptoms. He does feel that he is getting better slowly with the passage of time.

He currently is getting no active treatment other than the Darvocet. He is otherwise in good health, other than the ulcerative colitis.

This is a large, muscular man. Forward, backward, right and left bending are moderately limited, all causing iliolumbar and left buttock pain to some degree. He has no tenderness. He heel-and-toe-walks well and does a deep knee-bend well. He has no motor deficits in his legs. He has decreased sensation anterolaterally in his left thigh. There is no Tinel's at his anterior-superior iliac spine. His deep tendon reflexes are +2 and equal bilaterally at his knees and at his ankles. The girths of his calves are equal at equal levels. Straight leg raising is to 70° on the right, where he feels tight. At 45° on the left he feels a more significant pain into his left leg, worsened by dorsiflexing his foot, relieved by bending his knee. Axial compression is negative. His pelvis is level. He has no abnormal curves in his back.

X-Rays of his lumbar spine were sent in with the patient. These were AP, lateral, and spot views. He has six non-rib-bearing vertebrae. Calling the bottom vertebra "L5" (as was done on his MRI), he has narrowing at L4-5. The x-rays are otherwise unremarkable. The MRI of 4/22/95 was not available today but will be obtained. This was read by the radiologist as showing degeneration at L4-5 and a probable central disk herniation at L4-5.

"IMPRESSION:

Probably herniated nucleus pulposus, L4-5, with mild radiculopathy,

left leg.

"COMMENT:

The answers to the specific questions in the letter of 4/26/95 are as follows:

1. I feel that the diagnosis is as given above.
2. I do not recommend surgery for this patient at this point. He should have surgery only if he worsens with the passage of time. This was discussed with the patient.
3. I feel that this patient is slowly improving with time, and I feel that his best treatment would be to continue as at present. That is to say, I feel that he can do his regular job as he is doing at this time but that he should be careful about his activities, avoiding the most stressful of activities involving lifting and bending. The chance that he will continue to improve with the passage of time is reasonably high. If his leg symptoms increase, however, I feel that it would be the responsibility of the industrial insurance carrier to look into this further. I would emphasize that I do not feel that a further workup is indicated at this point. I also do not feel that other treatments such as physical therapy, adjustments, and so on would make any difference for this patient at this point.

"All of this was discussed with the patient," according to the doctor.

Dr. Dunn next saw Claimant on June 18, 1996, at which time the doctor took the following history report of the previous fourteen (14) months since he last saw the Claimant (**Id.** at 165):

"I had seen this man 14 months ago for an IME. He has had no medical treatment since then. After I saw him he did well. He was working and was having no particular troubles. About a month ago he got laid-off from his regular job. Since then he has been driving a semi 3-4 days a week, and he has gotten pain in his low-back. He feels pain in the left leg posteriorly to his knee, and sometimes to his ankle. He still has the numbness in his left leg, somewhat posterolaterally in the thigh, as before. His right leg doesn't hurt him. He has no bladder symptoms or groin symptoms. His back bothers him more than his leg. Hie is worsened by lifting, bending, coughing, sneezing, sitting, standing, and walking. Lying down is well-tolerated.

He is otherwise in good health.

He says his claim is open.

"PHYSICAL EXAMINATION today shows that forward, backward, right and

left bending are markedly limited, with all causing iliolumbar pain, but he has no tenderness in that area. He heel-and-toe-walks well and does a deep knee-bend well. He has no motor deficits. He has decreased sensation on the lateral aspect of his left thigh, and to some degree posteriorly on his right calf, which is difficult to explain. His DTR's are +2 and equal bilaterally at his knees and his ankles...

"IMPRESSION:

Herniated nucleus polposus, centrally, L4-5, with recurrence.

"RECOMMENDATIONS:

He is taking prednisone, 50 mg a day, for his ulcerative colitis, and there is no reason to consider further anti-inflammatories. We talked to him about his options, those being:

1. Living with it, as he has been doing.
2. Taking time off work, since it is obvious that the driving is what has gotten him in pain again.
3. Considering getting his back treated surgically, which would require further diagnostic tests and consideration.

He is going to consider these choices and phone me in a day or two," according to the doctor.

On June 25, 1996 Claimant telephoned the doctor and advised that "he (was) doing poorly" and "wanted to know if he could go to a pain clinic." Dr. Dunn agreed that such referral was an option (**Id.** at 155) and he sent the following letter to the Carrier on that day (**Id.** at 156):

"Russell Everitt has seen me for his low-back problem. He has a central disk herniation at L4-5 and has back pain. He is unable to tolerate the pain, but he cannot change his work at this point and he cannot get his back treated surgically at this point.

"He would like to go to a pain clinic, and I think this is a reasonable request. If it would be satisfactory, we will refer him."

Dr. Dunn kept Claimant out of work as he was totally disabled for all work since a new injury on August 5, 1996 while working for Marine Terminals (MT). (**Id.** at 157)

The record reflects that Claimant was an "A" registered stevedore and the "A" status gave him full union status and access to more jobs. (TR 125-126) Just before this, on August 5, 1996, Mr. Everitt was working at Marine Terminals Corporation at Terminal 30 in Seattle when he had another injury. He was driving a semi-truck with a container on the chassis, waiting for the crane to

remove the container to load it on the ship. However, one of the front pins that connected the container to the chassis failed to release, and when the crane picked up the container, it also picked up the truck with Mr. Everitt in it. (TR 81) The truck cab is connected to the chassis by means of a "fifth wheel," which acted as a pivot point. Because the stuck pin was in the front rather than the back of the chassis, this part of the truck (and the cab) was lifted up higher than the rear, eight feet or more. (TR 124) Then, the crane dropped the truck "like dropping a rock onto the concrete." Claimant was shaken up and his leg started hurting almost immediately. (TR 81) The incident made his back pain "significantly worse." (TR 125)

Following this accident, Claimant asked to transfer to Dr. Dunn as his treating doctor, because he felt Dr. Russo was emphasizing surgery too much. (Tr 147) He continued to be treated by Dr. DuPen. (TR 112)

Stuart L. DuPen, M.D., a specialist in pain management, examined Claimant on July 23, 1996, at which time the doctor took the following history report (CX 15 at 238):

"PAST HISTORY: This is a 46-year-old longshoreman who was well until approximately two years ago, at which time when working on the job, he had an injury to his lower back. He was seen by Dr. Russo out in Covington, who evaluated him, and recommended surgery for a central disk. The patient turned down the surgery. He states that he does not want a surgery, because of social issues. His wife is undergoing treatment of a carcinoma, and he needs to continue to work. He continues to have pain, which he describes as low back pain, with a radicular component into the left hip and occasionally down the left leg. Studies have shown a central disk. He has had recommendations from surgery from both Dr. Russo and Dr. Ernie Dunn, but options given by Dr. Ernie Dunn describing conservative care, if possible, and leaving his job, or rest to avoid continued aggravation.

"OTHER MEDICAL HISTORY: Other significant medical history is the fact that he has ulcerative colitis. He is currently receiving prednisone 40 mg every other day any hydrochlorothiazide. He is taking medications for kidney stones and diarrhea, and he is on potassium replacement. He has functioned quite well with his ulcerative colitis, and is being cared for by a gastroenterologist at Mason Clinic for this.

Current treatment for the episodes of his low back pain have included epidural steroids x 2, which were effective, but only gave him short-term relief. He has not been on tricyclic antidepressants or Neurontin, and has not received any other analgesics other than Vicodin.

"PHYSICAL EXAMINATION: GENERAL: He is a well-developed, 46-year-old

patient who is strong, who has no neurologic findings. Deep tendon reflexes are equal bilaterally. No skin sensation loss, or motor loss, but does have signs of a central disk at L4-5, and he does have a pain which seems to be lateralized to the left.

"PLAN FOR TREATMENT:

1. At the present time, I think we should start him on a tricyclic antidepressant for the neuropathic pain.
2. We should, second, consider Neurontin as an anticonvulsant.
3. We need an analgesic which we only use at night.
4. We need to move into consideration of repeat epidural steroids, with a repeat block in three weeks, and another repeat block three weeks later to get a sustained effect from the pressure on the nerve root, and at the same time proceeding with the medication management.

"FUTURE TREATMENT PLAN:

1. As above.
2. Contract signed for opioid administration, and we will request records from Dr. Russo's office, according to the doctor.

I note that Dr. DuPen sent copies of that report to Dr. Dunn, H. Doyle Perkins, M.D., and to the Carrier. (**Id.** at 239)

Dr. DuPen next saw Claimant on August 7, 1996, at which time the doctor took the following history report (CX 15 at 241):

"Mr. Everitt is a longshoreman with an L5 central disc. He has had some low back pain with a radicular component and some shooting electrical pain in the back. This is due to an accident that occurred in the last several days on the docks. He jerked around when the crane lifted his truck up. He has increased pain and is off work which is appropriate and supported by us. The medication Oxy-Contin is helping his pain but he cannot take that at work. He is on desipramine but has not titrated the dose upward and we will encourage him to do this.

"PLAN FOR TREATMENT:

1. Epidural steroids; this has not been done since 1994.
2. Continue Oxy-Contin but have him take it twice a day, once in the morning and once at night while increasing desipramine from 10 mg a HS on up to 20 now and then 30 mg in five days. Hopefully that combination will be of help.

"FUTURE PLANS: Proceed with the previously described plan. Also will consider adding Neurontin to the medication and possibly some rescue medication if the steroids don't relieve the pain," according to the doctor.

Dr. DuPen saw Claimant on August 15, 1996, on August 23, 1996 and on September 6, 1996 at which visits the back pain persisted. (*Id.* at 241) At the October 8, 1996 visit Dr. DuPen reported (*Id.* at 242):

"Patient has a herniated disk at L4-5. He has had surgery recommended on several occasions by several different people. He has now returned to full-time work and, of course, some of this work is aggravating his low back pain. We have him on Neurontin, which has relieved the radicular component of his pain, but the back pain is still present. I believe his wife is fighting breast cancer, and he does not feel he can quit work at this time and have the surgery, so he is continuing to work through it. We are supporting him during this time but there will be a point where we can't continue with the medications. The medications, in my opinion, are not sedating him or creating side effects, and I believe he can continue working in a safe and appropriate way..."

Dr. Dunn also saw Claimant on September 9, 1996 and September 20, 1996 and he released Claimant to return to work at his original job on September 20, 1996. (CX 11 at 158-159)

Dr. DuPen next saw Claimant on September 11, 1996, at which time the doctor reported (CX 15 at 243):

"Russell is a 46-year-old patient with known L4-5 disc herniation with left L5 distribution pain, which increases with his activity. He works down at the marine terminal and does significant lifting to aggravate the pain. His wife is suffering from breast carcinoma and undergoing chemotherapy and also receiving therapy for fibromyalgia. At the present time, he is trying to avoid surgical intervention, but it looks like this, which has been recommended by Dr. Ernie Dunn, is going to be required. We continue to just buy time at the present time. He currently is taking analgesics for pain control. He is taking oxycodone, using a maximum of 6 a day. He is taking oxycontin 20 mg tablets, one three times a day. He is taking adjuvant therapies. My concern regarding this issue is how his psychiatric condition is affecting him, and I would like to request from the Majestic Insurance permission to proceed with psychiatric evaluation and at least one or two return visits to determine whether or not his depression is secondary to the pain or secondary to other causes, as the depression that he is experiencing I think is aggravating the problem of the pain management and aggravating the decision-making process regarding whether or not he needs surgical intervention. I have recommended that he see Dr. Hamm and that that be done as soon as possible.

"We plan to continue his current therapy and I am further requesting, because of the neuropathic nature of the pain and because of the responsiveness of the pain to the epidural steroids in the past, that we consider repeating the lumbar epidural and caudal Depo-Medrol injections which were last done at the end of August," according to the doctor.

Dr. DuPen next saw Claimant on February 7, 1997, at which time the doctor reported (CX 15 at 244):

"This patient has an L4-5 disc that has been proven. He has neuropathic pain in the left leg consistent with a disc following that same pattern. His pain history is complicated by ulcerative colitis. He is currently taking oxycontin and oxycodone for pain control, and we are continuing to support his pain with this medication until more definitive surgery can be done.

"His activity levels and functionality are increased with the medication, and we're hoping that the more definitive surgical interventions can be done this year. There is some question between the two insurance companies, and once that is worked out, hopefully this can be accomplished. We discussed tolerance from long-term drug use and the importance to move on and stop the pain another way rather than with medication management.

"He has had good responses to epidural steroids, so we're going to repeat those. They were last done in September and hopefully we can improve his pain with that," according to the doctor.

Claimant has been undergoing psychiatric evaluation for several years and noteworthy is the January 27, 1997 report of John E. Hamm, M.D., P.S., Board-Certified in Psychiatry and Neurology, wherein the doctor states as follows in his letter to Claimant's attorney (CX 16 at 271-276):

"At your request, I am preparing this summary concerning my treatment of Mr. Everitt.

"I first saw Mr. Everitt on December 10, 1996. His chief complaint was 'depression.' He had been treated for chronic pain problems and was managed by Dr. Dupen at the Swedish Pain Management Center. At that time, Dr. Dupen was treating him with a combination of desipramine and Neurontin. He had been taking antidepressant medication for about four months for pain and depressive symptoms. This had not been adequate to treat his symptomatology and he requested an independent evaluation by a psychiatrist.

"He told me that he had some problems with depression for about two years. There had been depression following the 1994 back injury that occurred while he was performing his stevedorian job. He had had ongoing pain problems and some associated depressive symptoms,

and may have received antidepressant medication at the Virginia Mason Clinic in 1994. In August of 1996, he had another back injury which 'aggravated my old injury.' The pain was of such severity that he was off of work for a while and felt 'moody and short-tempered.' He did not receive any disability payments for the first month and he was worried about financial problems. He indicated that his alcohol use increased in 1995 and 1996. He used this after work to help treat his pain problems. Another stressor was associated with his wife's diagnosis of breast cancer and subsequent mastectomy in January 1996. In addition, his father died in July of 1996. In the summer and fall of 1996, Mr. Everitt's depression increased such that he was socially withdrawn, did not feel like working, 'I only wanted to watch t.v.' When I first saw him on September 10, 1996, he was having anger problems. He stated that he felt angry inside and was irritable and felt like throwing things. He stated that this was uncharacteristic of him. He was not physically acting out anger, but was afraid that he might. He also had tearfulness, worries about taking care of himself and his ability to 'take care of everything.' He was having sleep difficulties with some early morning awakening...

"It was my clinical impression that Mr. Everitt was suffering from a chronic major depressive disorder of moderate severity. It is my opinion that he had had depressive symptoms for approximately two years initially following his back injury of March 1994. His injury of August 1996 aggravated the depression because of the increased pain symptoms. Also, this was superimposed upon other stressors of his life (his father's death and his wife's cancer). His alcohol use I felt contributed to the depression.

"I recommended that he discontinue alcohol and I also recommended that he discontinue his desipramine and temazepam. I started him on Paxil medication. On December 24, he reported that he was feeling better. By January 24, he was considerably better. He has been taking 20 mg of Paxil each day. As of my last meeting with him today, January 24, 1997, his medication was increased because he still had residual symptoms of depression. His current treatment regime is 30 mg of Paxil per night, and this may be increased to 40 mg. I plan to continue to treat Mr. Everitt for major depression. I will probably be contacting his physicians in the future concerning his narcotic drug management. Mr. Everitt may be having surgery in the near future and will need treatment throughout his surgical convalescence. He also requires some psychotherapy to help him deal with issues of depression and anger that are not able to be treated by medication," according to the doctor.

As of March 7, 1997, Dr. DuPen elected to proceed with a lumbar epidural Depo-Medrol injection today. We have been waiting since September and it is my medical judgment that we need to go ahead at this point in time. His disc herniation at L4-5 is the causative problem. We continue to have pain, which is neuropathic

in nature secondary to that disc. We proceeded with a lumbar epidural Depo-Medrol injection at the L3-4 space today using a total of 7 ml of solution, 80 mg of Depo-Medrol. The patient tolerated this procedure very well and was ambulated and found to be stable and discharged with no apparent post block complications," according to the doctor.

Moreover, "this patient comes in today and still has low back and radicular leg pain. There have been issues with the insurance company regarding who is going to cover this, federal L&I or his primary insurance company. This had delayed his care for at least three months. I think it is imperative that we proceed with his care for a reasonable outcome. He clearly has a disc. Surgery has been recommended. We are attempting more conservative care because of his wife's terminal disease and the importance of him being available to her for at least the beginning of her care until there is some more stabilization. We have recommended repeat epidural steroid injection, and there have been delays so we're proceeding with that and the insurance companies can battle over the issues secondary to that.

"We have refilled his medications for the next two months, and we'll see him back in two months' time," according to the doctor.

Dr. Dunn next saw Claimant on March 18, 1997 and the doctor sent the following letter to the Carrier at that time (CX 11 at 160-164):

"Disability Examination:

This 47-year-old man has been examined by this examiner several times in the past. He was originally injured while working for Pacific Maritime as a longshoreman on 3/25/94. He had had a history of some back pain prior to that, including being off work for six months at one time previously. He injured his back on 3/25/94 when he twisted his back and developed low-back pain. He subsequently developed pain into his left leg posteriorly to the Achilles area. This pain tended to come and go. He was given various forms of conservative treatment and had an MRI performed on 4/22/95 which was read as showing a probably central disk herniation at L4-5. At the time of my examination of 4/28/95, I felt that this patient had a mild radiculopathy in his left leg and felt that he was doing well enough at that time that he could work, and I felt that no further treatment was required. Following that exam he did well for a period of time. He was working and was able to get by. In approximately May 1996 he was laid-off his from regular job and had been driving a semi for 3-4 days a week when he re-developed the pain in his low-back and in his left leg posteriorly to his knee, and to some degree to his ankle. When I examined him in June of that year, I thought that he had a recurrence of his central disk herniation and that he had three choices, those being to live with his symptoms, to take time off

work, or to consider getting his back treated surgically, although I felt that further diagnostic tests would be necessary before that could be considered.

"The patient wanted to go to a pain clinic and ultimately was referred to the pain clinic at Swedish Hospital. He then had a new injury while on the job, this being on 8/5/96. At that time he was driving a semi when he twisted sharply to his left and developed sudden low-back pain. He felt that the low-back pain was of a different character than he had been having. He also felt some increase in the left-leg pain. He was off work until September 21, and during that time he was getting conservative treatment including oral medications and epidural corticosteroid injections. He improved, but not to the point where he was as good as he had been prior to the injury of 8/5/96. He then returned to work on a full-time basis on 9/21/96. Since then he has continued to take medications including Oxycontin, three a day; "Neurooxycodone" (sic), six a day; and an anti-inflammatory. He wears a corset. He has had recent epidurals and has had a great many epidurals. He has had no physical therapy and no chiropractic adjustments. He does extension exercises daily, although they hurt him.

"It should be noted that he has a diagnosis of ulcerative colitis and takes prednisone, 30 mg every-other-day, for this. He is working full-time. He is no longer driving a semi. He is now working as a regular longshoreman. He feels that he needs the above medications in order to do so."

After the physical examination Dr. Dunn concluded as follows (**Id.**):

"IMAGING STUDIES:

No further imaging studies were ordered for this exam.

"IMPRESSION:

Central disk herniation, L4-5, with no clear-cut evidence of radiculopathy at this time.

"COMMENT:

I have been asked questions by two different insurance companies.

"The answers to the questions in the 3/12/97 letter from Homeport Insurance Company are as follows:

1. The diagnosis is as given above.
2. I feel that continuing epidural injections and the taking of narcotic pain medicines is not the best direction to go with this patient. Either he can work without medication or he cannot. I feel, however, that he should be weaned from these medications as quickly as possible. His options will then be to live with his symptoms, to quit doing this kind of work, or

to get his back treated surgically. I am not at all certain that this man is a surgical candidate at this point. I no longer see evidence that there is a radiculopathy, and a simple disk excision would not appear to be the answer. I will not go into the problems with a lumbar fusion in an industrially injured worker, only to say that that operation should be considered only as a last resort. Before considering such a thing, a considerable workup should be done. This probably should include a sedimentation rate to make sure that his ulcerative colitis is not of significance; a myelogram and a post-myelographic CAT scan to see the status of the L4-5 disk when the patient is upright; and MMPI; and whatever else the treating surgeon feels might be necessary.

3. **It would appear from the history given that the 8/5/96 injury caused an aggravation of the underlying condition.** The patient says that he has not improved to the point where he was prior to that aggravation, but in reviewing my previous notes, it would appear to me that the vast majority of this patient's present problem would be considered as due to his injury of 3/25/94 and not the injury of 8/5/96. (Emphasis added)
4. The findings and symptoms are essentially the same now as they were prior to the injury of 8/5/96. Further imaging studies could be done. If these do not show a change in the anatomical situation of this patient's back, then I would say that his present condition is due entirely to the injury of 3/25/94. If imaging studies such as that showed a change in the anatomical situation in his back, then I would have to feel that his present condition is due to the underlying condition and an aggravation still ongoing from the injury of 8/5/96.
5. **This man's symptoms are apparently made worse by the work that he is doing. Work that involves lifting, twisting, and bending would be undesirable for this patient.** (Emphasis added)

The answers to the questions in the letter from Majestic Insurance of 3/13/97 are as follows:

1. It is certainly achievable that this patient could work at his current level without surgery, but I feel that it is unacceptable for him to continue to work at this level taking the medications that he is now taking. If he stops the medications, he may or may not be able to work at this level.
2. I would consider surgery in this patient only after major thorough evaluation and consideration. I would be guarded in my estimation of his ability to be able to return to waterfront employment simply because of the history of such

cases in general.

3. Regarding the question as to what prolonged and permanent effects can be anticipated from conservative care versus surgical intervention, this question is so broad and problematical that I simply cannot give a simple answer to it. This would require a discourse on all possible conservative and surgical treatments and all possible outcomes.
4. My recommendations are discussed above. I feel that this patient should stop taking the medications that he is taking. If he can no longer work, then he should be evaluated very thoroughly by someone experienced with back surgery to make a decision as to whether back surgery is appropriate or not. If it is felt not to be appropriate, then the patient will have to decide either to work with his symptoms as they are or to find a different kind of work.
5. **I feel that the 8/5/96 injury represents an aggravation of the pre-existing injury of 3/25/94/ and the 3/25/94 injury is by far the most significant.** Please see, however, my answers above concerning how this answer might change if he had an imaging study that showed an anatomical change. (Emphasis added)
6. The patient says that he is still worse following the 8/5/96 injury. This is subjective.
7. The injury of 3/25/94 is indeed subject to exacerbation.
8. It would be my opinion that if surgery is finally decided on, this surgery would be due to the injury of 3/25/94 and not the injury of 8/5/96.
9. Further imaging studies would be necessary to determine the permanent effects of each injury, but on the basis of the information at hand, it would be my feeling that any permanent residuals from these injuries would be due to the injury of 3/25/94 and not the injury of 8/5/96, according to the doctor.

Dr. Dunn sent the following letter to Homeport Insurance Company on April 2, 1997 (CX 11 at 165):

"This is in response to your letter of March 31, 1997, concerning Russell Everitt.

"In my report of March 18, 1997, I did indeed make recommendations for further diagnostic workup. I have seen this patient on several occasions to perform independent medical exams. I have not considered myself a treating doctor in this case.

"As stated in my note, I feel that he should see someone

experienced in back surgery so that the appropriate evaluation could be done to see whether this patient is a surgical candidate or not," according to the doctor.

As of April 5, 1997, Dr. Dunn took Claimant out of work. (**Id.** at 166-167)

Dr. DuPen continued to see Claimant as needed to evaluate/treat his "significant low back and radicular leg pain, which (was) bilateral, a little more on the left side," as of April 18, 1997. (CX 15 at 246)

Dr. Mark C. Remington, an orthopedic surgeon who examined Claimant upon referral from Dr. DuPen, concluded as follows in his May 7, 1997 report to Dr. DuPen (CX 17 at 277-278):

"XRAYs: AP, lateral, flexion/extension were obtained today. There is markedly decreased disc height at 4-5. No signs of instability and actually little change of position on flexion/extension views. Other levels seem to have more well-reserved disc space.

"MY IMPRESSION is that Russell has ongoing back pain for three years. He has gotten some response to epidurals in the past. He has not been through a formal rehabilitation program. He is still limited by pain, has become progressively worse recently. I think this warrants further evaluation. Apparently the claims and who is going to be paying for his work-up is unsettled. I suggest we proceed with MRI scan that would allow us to adequately evaluate disc integrity, possible nerve root compression. He will be following up after the scan," according to the Employer.

The MRI was performed on May 16, 1997 and the radiologist read that test as showing the following (**Id.** at 280):

"CONCLUSION

1. Progression of degenerative disc changes, L4-5. Decreased prominence of the more discrete central protrusion at the L4-5 level since the previous exam.
2. Continued small appearance of the thecal sac from L4 to S2, which appears to be due to a large amount of epidural fat that is likely representative of epidural lipomatosis. This has not changed significantly," according to the doctor.

Dr. Remington, as of May 20, 1997, recommended "bilateral L4-5 facet joint blocks to see if facet joint discomfort is contributing to his back pain" because of his "long-standing back pain and problems with disability" (**Id.** at 282), and the doctor sent the following letter to Homeport's claims adjuster on July 3, 1997 (**Id.** at 283):

"This is regarding your letter of May 6, 1997.

"I believe most of your questions can be answered in the enclosed copy of my notes when I saw Mr. Everitt on May 7, 1997 and May 20, 1997. Your history, as presented in your letter, is very similar to that I obtained from the patient.

"The diagnosis for Mr. Everitt's current condition is a lumbar spondylosis with radiculopathy and degenerative disk disease. On the basis of the medical findings, my recommendations were to repeat the MRI scan. This was obtained, and I reviewed it with Mr. Everitt on May 20, 1997. I currently do not believe surgical intervention is necessary or recommended. **I do believe that Mr. Everitt's incidence (sic) on August 5, 1996 aggravated his underlying condition. I believe this would most likely be a temporary aggravation of this underlying condition.** I think his symptoms remain somewhat similar. Unfortunately, he has a significant amount of degenerative changes in his spine; however, I do not think surgical intervention is necessary or warranted. (Emphasis added)

"I believe that Mr. Everitt can return to work with the same restrictions. It is possible he could get some relief with L4-5 facet joint blocks. This may provide some symptomatic improvement. However, I do not think this treatment would in any way change his restrictions or indicate the necessity for surgery," according to the doctor.

Dr. Remington saw Claimant on September 16, 1997 and, according to the doctor's progress note (**Id.** at 284):

"Russell comes in today in followup. He has had bilateral facet joint blocks by Dr. DuPen. This provided some significant degree of pain relief, however, this was only temporary.

"**IMPRESSION:** I discussed the situation with Russell today. He has persistent, predominantly back pain. He has degenerative disc disease and he also has some facet arthropathy.

"**PLAN:** I explained that I do not feel that facet joint blocks predict the outcome of a fusion. I think this gentleman is a marginal, at best, candidate for a fusion. However, I explained to him that it may be worthwhile to seek out other opinions. I explained that there are other spine surgeons in town who may give him a more positive endorsement for surgical intervention. It is possible that he could have a discogram, and if this reproduced his pain, it may be argued that he could improve with surgery. He has also discussed with Dr. DuPen an electrical stimulator, and I think this is a reasonable approach. He understands that this faces possible problems with funding. I think it would be worth a trial to see if this helps him with his discomfort. Whereas before when I saw him, he had weaned himself off of his medications, he

currently is now back on pain medications and requiring this. He continues to work, but he is complaining of increasing symptoms. He is concerned about continuing coverage of his condition. I explained that if he has any increased symptoms, my approach would be that it most likely represents an exacerbation of a previous condition. I think he is comfortable with our discussion. I would be happy to provide him with the names of other surgeons. He can followup on a p.r.n. basis," according to the doctor.

As noted, Dr. Remington recommended a facet block injection on the L4-5 facet and Dr. DuPen performed that injection on June 10, 1997. (**Id.**)

Bilateral L4-5 facet blocks were then performed and, as of July 22, 1997, they had provided some relief and Dr. DuPen recommended that Claimant return to see Dr. Remington for follow-up. (**Id.** at 248)

As of September 11, 1997, Dr. DuPen discussed with Claimant "the possibility of placing a spinal cord stimulator for the control of his pain" and, as of December 19, 1997, Dr. DuPen described Claimant as having "an active disc low back and radicular leg pain" and the doctor reported that Claimant underwent a discogram two days earlier "and now has increased leg pain that was less of the problem earlier," Claimant describing "his pain as approximately 7 to 8 out of 10." (**Id.** at 249)

Dr. DuPen continued to see Claimant as needed and, as of November 5, 1997 and the symptoms persisted. At this visit the doctor's final diagnosis was (**Id.** at 250):

1. Continued chronic low back and radicular leg pain.
2. Situational depression.

Dr. DuPen reported that Claimant was taking Paxil for his depression, a condition partly related to his wife's terminal illness. (**Id.**)

As of January 8, 1998, Dr. DuPen reported that Claimant would "be having surgery (the following) week with Dr. Preston Phillips, who will be doing a fusion and disc removal," Dr. DuPen opining, "Clearly his problems are directly associated with his employment." (**Id.** at 251)

Dr. Phillips, an orthopedic surgeon who first saw Claimant on November 5, 1997 and whose impression as of that visit was "lumbar musculoligamentous strain with an exacerbation of the patient's chronic low back pain, associated with a central L4-5 herniation and left lower extremity radiculitis," performed lumbar discography on December 17, 1997. That test confirmed the need for surgery and on January 13, 1998 Dr. Phillips performed a "lumbar laminectomy

and diskectomy with performance of a posterior lumbar interbody fusion utilizing the BAK fusion cage and local bone graft." The doctor's treatment records are in evidence as CX 18 at 285-325.

As of August 11, 1998 Dr. Phillips released Claimant to return to work but he "is to do so with caution with regard to avoiding heavy lifting, twisting and bending." (CX 18 at 309) As of November 2, 1998 Claimant "was advised to always avoid a real strenuous exertional type of work in order to protect his back, given his previous surgery." (**Id.** at 310)

Dr. Phillips sent the following letter to Homeport Insurance on November 16, 1998 (**Id.** at 312:)

"Thank you for your Faxed correspondence in reference to Mr. Russell Everitt, dated October 30, 1998.

"Please review my enclosed office note. It is my opinion that Mr. Everitt is currently not fixed and stable. He has returned to work; however, there are other issues that are being addressed at this time as they relate to his back and the chronicity of his symptoms. He is currently working with The Pain Management Center through Stuart DuPen, M.D., to help resolve these issues.

"I recommended that he continue working at his current level of activity with the necessary precautions, which were previously outlined."

Dr. DuPen also continued to see Claimant as needed between March 4, 1998 and May 7, 1999 and these treatment records are in evidence as CX 15 at 252-270.

Dr. Phillips had a conference on March 24, 1999 with two representatives of Homeport and, according to the doctor's notes thereof (CX 18 at 317):

"A lengthy discussion was had with Jeaneil Brown and Christine Tabalno. Mr. Russell Everitt's medical chart was reviewed in detail with regard to presenting symptoms and subsequent treatment, as well as his progress postoperatively. His last evaluation was also discussed. It was communicated by Ms. Tabalno and Ms. Brown that Mr. Everitt has only been able to work on a limited basis since he was released, due to associated increased discomfort in his back, as well as his difficulty (as previously noted) weaning off of narcotic medication. The patient is currently being followed by Dr. DuPen and is currently on a weaning program. The patient also recently lost his wife who died of cancer. He also had to move from one location to another and it was discussed that this may have aggravated his discomfort, as outlined by Ms. Tabalno and Ms. Brown.

"A lengthy discussion was had surrounding the patient's ongoing

symptoms, associated dependency, as well as psychological stressors associated with the recent death of his wife. It was discussed that continued work with Dr. DuPen, via the Pain Management Program, and subsequent weaning off of the narcotic medication is again warranted. **It was also discussed that due to the associated psychological factors, perhaps referring the patient to a psychiatrist would be of great benefit to the patient.** His work status was also discussed. As previously outlined, the patient was released to work in a modified capacity. Those work restrictions are still presently assigned. Mr. Everitt is scheduled for a followup appointment tomorrow. I will have the opportunity to evaluate his interval progress at that time. In addition, the plan will include making a referral for psychological/psychiatric evaluation. Perhaps aid with depression, if that is deemed appropriate, following his evaluation. This discussion lasted 25 to 30 minutes." (Emphasis added)

Dr. Phillips next saw Claimant on March 25, 1999 and, according to the doctor's progress note (**Id.** at 318):

"...A lengthy discussion was had with the patient today surrounding his ongoing symptoms. It was also discussed that a recent meeting was had with his case managers. We also discussed the recent death of the patient's wife.

The following points were discussed:

1. His ongoing use and need for pain medicine, from which he is currently being weaned under the guidance of Dr. Stuart DuPen. It was recommended that the patient continue with this weaning program, as well as continue with increasing his activity level.
2. It was discussed that with the stress of the recent surgery and his recovery, as well as the recent death of his wife, these factors may be impeding his progress. Therefore, I recommended that a psychiatric consultation be pursued. The patient will be referred to Dr. Jason McClurg or one of Dr. McClurg's associates.

The patient states that he has only worked on a limited basis due to his continued discomfort. He states that driving a truck is uncomfortable, due to the vibration and friction. It was discussed that after the patient has seen the psychiatrist and his weaning from the medication has progressed, then the plan will include working with his case manager to seek to secure a job that he can perform without aggravating his lower back symptoms.

The patient will return for a followup evaluation in approximately six to eight weeks. He was given a work release form indicating that he is released to return to work in a modified capacity, with a lifting restriction of 35 to 50 pounds. However, a caveat was

added that he should perform no repetitive lifting, according to the doctor.

Dr. Phillips next saw Claimant on April 1, 1999 and he advised the doctor "that he (had) returned to work this past week and was driving one of the larger trucks. The jarring around in the truck resulted in discomfort in his back. He comes in wondering whether or not he can continue driving the large tractor trucks, given his back surgery." Dr. Phillips then had a "lengthy discussion" with the Claimant and he was instructed to check with his employer and union to ascertain whether there are any jobs for him on the waterfront that would not aggravate his lumbar problems and the doctor would be "happy to review those and make comments with regard to any potential restrictions." Dr. Phillips recommended that Claimant continue to see Dr. DuPen and his psychiatrist. (**Id.** at 319)

Claimant has also been treated by Sandra C. Walker, M.D., a psychiatrist, and Dr. Walker sent the following letter to Homeport Insurance on May 8, 1999 (CX 38 at 335-336)

"This letter constitutes my report resulting from my recent evaluation of Mr. Russell Everitt. My evaluation is based on three interviews with Mr. Everitt - on April 20, 1999, April 29, 1999, and May 5, 1999 - and on my telephone conversation with Preston Philips, MD, of April 21, 1999. In addition, I have reviewed the letter and enclosures sent to me by Ms. Christine Tabalno, dated April 6, 1999. I have not yet been able to speak with Stuart DuPen, MD, although we have made efforts to reach each other regarding Mr. Everitt.

"Mr. Everitt has sustained several work related back injuries since 1993. As the result of an injury sustained in October, 1997, Mr. Everitt underwent lumbar laminectomy in January, 1998. Despite treatment, Dr. Philips confirms that Mr. Everitt continues to experience chronic back pain.

"Mr. Everitt says that his current pain is greater than the pain he experienced prior to his spinal surgery. He feels that his work and leisure activities as well as his activities of daily living have been affected by his back pain. He says that he is unable to bend without pain, can no longer take long walks, and can not perform yard work or house work as he used to be able to do. Mr. Everitt's pain experience has been complicated by the death of his wife from cancer in late January, 1999. Prior to her death, Mr. Everitt used morphine, prescribed for his wife, to supplement his own pain medication. He completed an opiate taper and is now using, by his report, two to three Vicodin tablets per day for pain. Dr. DuPen has also prescribed antidepressant medication and medication for insomnia. Mr. Everitt feels that he benefits from these medications.

"Mr. Everitt endorses depressed mood and feelings of hopelessness about 'starting over' after the loss of his mate. He also endorses transient suicidal thoughts, but has no intent to act on them. He feels that his concentration is adequate. He is unable to sleep well without medication. He feels 'too lazy to cook' and is trying to lose the weight he gained during his wife's last three months.

"Mr. Everitt has had a prior psychiatric evaluation approximately two years ago, but did not engage in treatment at that time. He attended group therapy sessions with his wife before her death in which he worked on 'learning to be aware of feelings.' Currently, he is attending grief counseling sessions at Hospice of Seattle. He has no history of psychiatric hospitalization or of suicide attempts. He has a fourteen year history of ulcerative colitis which he says is currently stable. He has never been treated for substance abuse, but endorses episodes of heavy drinking, particularly at times of emotional distress.

"Mr. Everitt's family history is remarkable for several cancer deaths. In addition to his wife's death due to breast cancer, Mr. Everitt's mother died of liver cancer and his biological father died of prostate cancer. Each of these deaths, he believes, could have been forestalled by proper medical care. Mr. Everitt acknowledges bitterness toward the medical profession for these losses. Mr. Everitt also experienced early loss when his parents divorced when he was four years old. When, as a late adolescent, he again had significant contact with his biological father, also a longshoreman, his father had already undergone spinal fusion surgery and was experiencing chronic back pain. Mr. Everitt recalls that he saw his father suffer for years with back pain and says 'I don't want to end up like my father.'

"In my opinion, Mr. Everitt's current pain experience is impacted by the factors I have outlined here. His recent loss of his wife seems to have evoked feelings of loss, grief and anger from past losses of loved ones. Mr. Everitt has demonstrated that he has difficulty tolerating both emotional and physical pain. His limited ability to tolerate and give full verbal expression to his emotional distress leaves him prone to physical expressions of stress and distress as may be seen with exacerbations of ulcerative colitis or heightened pain perception.

"I believe that Mr. Everitt can benefit from a limited course of psychotherapy through which he can gain better expression of his emotions as they relate to his current perception of his physical pain. I feel that twenty sessions of psychotherapy can make a significant difference in his pain experience, provided that his physical status with respect to his back remains stable," according to the doctor.

Claimant's symptoms persisted and on August 5, 1999 Dr. Phillips prescribed and performed "a trigger point injection"

because "the patient's discomfort is primarily spastic in nature and fairly well localized to a focal area." (**Id.** at 320)

Dr. Walker sent the following letter to Claimant's attorney on August 24, 1999. (CS 38 at 338):

"This letter is in response to your letter of August 23, 1999, in which you asked me to comment on a letter received from Jeaneil Brown, representing Homeport Insurance Company. Ms. Brown's letter is dated August 19, 1999. Specifically, you have requested comments regarding Ms. Brown's contention that 'Mr. Everitt's need for ongoing psychiatric treatment is due to the unfortunate and tragic personal experience he has faced over the past seven months.'

"I have evaluated Mr. Everitt on referral from his orthopedic surgeon, Dr. Preston Philips. Clearly, Mr. Everitt experiences chronic pain. This pain results from work-related injuries for which he has been treated by Dr. Philips and by Dr. DuPen. Mr. Everitt's pain preceded his loss of his wife.

"As you may know, the experience of pain is subjective. Many factors, in addition to direct irritation of nerves and tissue, contribute to any person's perception of pain. **It is my opinion that Mr. Everitt's experience, both prior to and subsequent to his injuries, contributes to his pain perception.** Psychiatric treatment for chronic pain includes addressing such associated factors so as to facilitate greater function despite ongoing pain experience. Ms. Brown appears to assert that Mr. Everitt's personal losses in recent months are the sole contributor to his need for psychiatric treatment. This is a mis-statement and oversimplification of Mr. Everitt's situation. I have recommended a course of psychotherapy to address Mr. Everitt's pain experience in the context of other factors which contribute to it. A hoped for outcome for treatment in cases such as Mr. Everitt's is greater ability to function in work and other aspects of life, even in the event of ongoing pain. (Emphasis added)

"I hope that this letter clarifies for you my opinion of Mr. Everitt's psychological situation with respect to his pain perception and function and of his need for psychiatric treatment," according to Dr. Walker.

As of October 7, 1999 Dr. Phillips referred Claimant to physical therapy because a trial of such therapy had helped him in the past. (**Id.** at 321) Thereafter, as of November 8, 1999, Dr. Phillips released Claimant to return to work with restrictions against driving a heavy truck for one month and lifting more than thirty-five pounds. (**Id.** at 322)

Dr. Phillips sent the following letter to Homeport on December 1, 1999 (**Id.** at 323):

"Thank you for your correspondence dated November 12, 1999, in reference to Mr. Russell Everitt. You have presented several questions in your correspondence as it relates to the patient's diagnosis and objective medical findings. You should have received a copy of my most recent evaluation, which was dated November 8, 1999. A copy of this evaluation is enclosed. This should answer your question No. 1 and No. 2.

"With regard to questions Nos. 3, **the patient clearly has sustained an aggravation of his previous injury. This is associated with sciatica, as noted in my evaluation.** To answer question No. 4, this most likely represents a temporary aggravation, which is the reason for the temporary restrictions that were outlined. Medications were also prescribed to aid the patient with regard to gaining some relief from these symptoms." (Emphasis added)

At the January 4, 2000 visit Claimant advised Dr. Phillips "that he has been driving smaller trucks and tolerating that quite well" and the doctor agreed that he should continue driving the smaller trucks, "particularly given the significant amount of jarring that occurs in the larger trucks" and as "such would minimize aggravation of his lower back." The doctor found only "a slight improvement" in his condition as he "still (had) persistent lumbar paraspinal muscular spasms." (**Id.** at 324) The doctor scheduled a followup visit in three months but there is no progress note for that visit, if it, in fact, took place. (**Id.** at 325)

Claimant has also been examined by John F. Dickson, M.D., a specialist in rheumatology, and the doctor sent the following letter to Attorney Slagle on September 2, 2000 (EX 22 at 346-370) and the doctor, after the usual social and employment history, his review of Claimant's medical records and diagnostic tests and after the physical examination, concluded as follows (EX at 368-370):

-ASSESSMENT-

Chronic low back pain, etiology multifactorial
Lumbar disc degeneration, onset antedating 1986
Lumbar "strain", multiple
Post-operative 1998 lumbar fusion
Chronic ulcerative colitis in symptomatic remission
Nephrolithiasis
Depression

History of inappropriate use of medications and alcohol

-COMMENTS-

There is no evidence of active peripheral joint inflammation nor evidence of residual damage from old inflammatory joint disease. The history of joint inflammation in 1978 and arthralgias to the early 1990's, without objective evidence of joint disease from

1981, have been attributed to "reactive" cause of chronic ulcerative colitis. The distribution of joint involvement and transient nature are not typical of the arthritis of inflammatory bowel disease (which is typically pauci-articular, large joint predominantly, and asymmetrical in distribution), such as the chronic ulcerative colitis he subsequently developed. The current doses of prednisone may be suppressing milk joint inflammation.

1. What is causing Mr. Everett's chronic pain complaint?

The patient has chronic, non-specific low back pain with radicular symptoms but no objective evidence for radiculopathy (*i.e.*, no sensory, motor, or reflex abnormality or signs of neurologic impingement on imaging studies). Symptoms are historically related to work events in 1984 and 1986 and other subsequent dates. The chart documents fluctuating right and left sided leg pains since 1994 and evidence of progressive degenerative discs as far back as 1986, representing age related deterioration.

The patient showed positive two of five "Waddell signs": low back pain on en-block rotation and marked discrepancy in sitting vs. supine straight leg raise. His straight leg raise was curiously positive bilaterally when supine and without augmentation on ankle flexion.

The patient's current symptoms are not clearly explained by clinical or imaging findings and psycho-social and other factors are likely playing substantial role in symptoms amplification and perpetuation, if not symptom production.

Although rest pain and prolonged morning stiffness suggests an inflammatory process, there is no objective clinical or imaging evidence to support a diagnosis of a spondylitis or sacroiliitis (*i.e.*, inflammatory axial skeletal disease).

2. What treatment is recommended?

Further surgical intervention, having largely failed once, is problematic and should be considered only after in depth psychological evaluation together with presence of objective findings which correlate with his symptomatology.

Evaluation and treatment of depression is warranted.

Given the past history of medication and alcohol misuse, prescription of narcotic analgesics and "muscle relaxants" is of questionable prudence, except for short term defined use.

3. Is Mr. Everitt's level of disability or need for treatment caused by, aggravated or accelerated by his employment as a longshoreman?

Back pain is common in the general population (lifetime incidence 70-85%), unrelated to specific activity or employment, and

recurrences of back pain are common after an initial episode. Degenerative changes in the lumbar spine are common with disc bulge found in 57-65% of asymptomatic 40 year olds. Correlation of episodic or chronic low back pain with degenerative disc disease in the absence of disc extrusion or neurologic findings is poor. **Employment involving specially heavy lifting, bending, stooping and twisting may be associated with an increased frequency of low back pain complaints.** Mr. Everitt's episodes of "injury and back pain" were not associated with fracture nor documented acute disc changes which would allow attribution of his level of disability or need for treatment to his employment. (Emphasis added)

4. What is Mr. Everett's prognosis?

Given the duration of his back symptoms, it is unlikely that these will resolve with any medical or surgical therapy.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first

instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita, supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence negating the connection between such harm and employment or working conditions. **Kier, supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56, 31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette**, 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See, e.g., Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See, e.g., Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Respondents contend that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board

has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. See **Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. See, e.g., **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Respondents' general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. See **generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. See also **Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which severs the causal link, the presumption is rebutted. See **Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. But see **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**,

29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Respondents dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to them to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his lumbar disc syndrome and his psychological problems, resulted from working conditions while working on the waterfront for the Employers joined herein. The Respondents have introduced evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As noted above, this proceeding has been referred to this Court while Claimant is temporarily disabled and receiving temporary total disability benefits. The questions for consideration by this Administrative Law Judge are whether the Claimant's condition for which he is currently treating is industrially related, and if so, which Employer/Carrier is responsible for his ongoing disability payments and medical treatment. SSA/Homeport (Employer I) has been paying those benefits, except for psychiatric care, pending the determination by this Court of the Responsible Carrier, but in the event it is determined that Marine Terminals/Majestic (Employer II) is responsible for some or all of those benefits, Employer I asks that they be reimbursed from Employer II for any such overpayment.

As noted, there are three injuries involved in this case and all involve Claimant's low back. The first injury occurred on March 25, 1994 when a turnbuckle slipped and Claimant strained his low back (OWCP No. 14-116045). This was an SSA injury. The second injury occurred on August 6, 1996 when the semi-truck Claimant was driving was picked up in the air by a crane and then dropped (OWCP No. 14-123192). This was a Marine Terminals injury. The third injury occurred on October 14, 1997 when a cargo board the Claimant was standing on tripped and he jumped to the ground (OWCP No. 14-126650). This was also an SSA injury. The Employers/Carriers take the position that each of these injuries was, at most, a temporary aggravation of Claimant's pre-existing degenerative disc disease, a condition that has been apparent since at least 1986.

As there are three (3) injuries before me and as the three Employers are joined herein, this proceeding presents the most interesting issue as to which Employer(s) is responsible for the benefits awarded herein and whether Claimant is entitled to an award of concurrent benefits for any or all of the successive injuries now before this Court.

In the case at bar, Claimant seeks the following relief:

1. Payment for psychotherapy for depression related in part to his chronic pain. The need for psychotherapy has been ongoing, probably back to the 1994 injury and certainly to the 1996 injury. However, Dr. Hamm states in his most recent report (EX 23 at 378-379) that the depression was worsening in 1998 and 1999. It would be most logical for responsibility for this treatment to be assessed against SSA, as the last employer, based upon the aggravation rule.

2. An order awarding temporary total disability benefits (currently being paid voluntarily) for the October 14, 1997 injury and related medical benefits, against Stevedoring Services of America based on an average weekly wage of \$1,259.16, as calculated below.

3. Permanent partial disability benefits awarded against Marine Terminal Corporation for the August 5, 1996 injury as calculated below based on an average weekly wage of \$1,955.01.

On the other hand, and as can be expected, Marine/Majestic contend that this is a "last responsible employer" case, that the last maritime employer is responsible for all of the resultant disability and for all of the benefits awarded herein and that Claimant is not entitled to concurrent awards pursuant to the rule of law articulated in **Independent Stevedore v. O'Leary**, 357 F.2d 812 (9th Cir. 1968), and as followed in subsequent decisions of the U.S. Court of Appeals for the Ninth Circuit. **See, e.g., Kelaita v. Director, OWCP**, 799 F.2d 1308, 1311 (9th Cir. 1986). A more recent case, **Buchanan v. International Transportation Services**, 31 BRBS 81

(1997), is currently on appeal to the Ninth Circuit and that Court should give us the final answer as to the continued validity of the "successive injuries" rule in that Circuit and as to whether "the last employer rule" may be used by an employer as an affirmative defense to defeat a claim for concurrent awards and to impose complete liability on a subsequent employer. Moreover, Marine/Majestic cite **Foundation Constructors v. Director, OWCP (Vanover)**, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), for the proposition that SSA/Homeport are responsible for all of the benefits awarded herein because Claimant's October 14, 1997 injury aggravated, accelerated or combined with his pre-existing orthopedic and psychological problems, thereby resulting in his current total disability.

I have extensively summarized the parties' positions herein to put this matter in proper perspective for the parties and for reviewing authorities. I shall now proceed to resolve Claimant's current disability.

As previously noted, the Employers/Carriers contend that the Claimant's low back problems are caused by his degenerative disc disease and were not permanently aggravated by his low back injuries. This condition first manifested itself following a low back strain the Claimant sustained on August 16, 1986, in the course of his employment with Acme Pump. Acme Pump is not a longshore employer. As a result of that strain, the Claimant was off work for six months and was diagnosed as having chronic low back pain. (EX 8) He was referred for vocational counseling and ultimately underwent treatment to detoxify him from narcotic medication overuse. (*Id.*) The degenerative disc disease in the Claimant's low back progressed over the years to the point he had a lumbar fusion on January 13, 1998. (EX 18 at 294-296) SSA takes the position that Claimant would have required this surgery whether or not he sustained injuries on March 25, 1994 or October 14, 1997.

In the case at bar the Claimant's average weekly wage is a complicated issue because during the course of the three injuries involved in this case, the Claimant progressed from a casual longshoreman to an "A" registered longshoreman. The change in Claimant's registration had a dramatic impact on his wage earning capacity and the three injuries involved in this case. Claimant became a "B" registered longshoreman on March 10, 1995 and an "A" registered longshoreman on July 31, 1996. (EX 1 at 2)

SSA's position on average weekly wage for the various injuries is as follows: At the time of the March 25, 1994 injury the Claimant was a casual longshoreman and his earning capacity is best represented by his actual earnings in the fifty two weeks prior to his injury. Gross earnings during that period were \$24,068.86 resulting in an average weekly wage of \$462.86. Gross earnings in the 52 weeks before the August 6, 1986 injury were \$89,800.23; however, SSA contends that those earnings are not representative of

the Claimant's annual earning capacity at the time of his August 6, 1996 injury for the following reasons. First, the Claimant was "B" registered during the year before the August 6, 1996 injury. He became "A" registered on July 31, 1996. (EX 1 at 2) That change in registration status gave the Claimant more work opportunity and a much higher choice of work. Second, the Claimant was off work due to a hernia surgery during one week of the 52 weeks prior to the August 6, 1996 injury. (EX 13 at 219) Dividing his annual earnings as a "B" registered longshoreman by the remaining 51 weeks would result in an average weekly wage of \$1,760.79, which is a very conservative estimate given the fact that the Claimant had just become "A" registered. The Claimant reached his maximum medical improvement from the August 6, 1996 injury on March 18, 1997 per the report of Dr. John Dunn. (EX 11 at 163-164) During the 30 weeks between March 18, 1997 and the October 14, 1997 injury, the Claimant's gross earnings were \$37,774.75 or \$1,259.16 per week. SSA contends that those wages overstate the Claimant's earning capacity at the time of the October 14, 1997 injury because during that time the Claimant was working in extreme pain and was taking large doses of prescription pain medications. (See e.g. EX 15) SSA submits that Claimant's actual earning capacity at the time of the October 14, 1997 injury was not more than \$880.40, which is 50% of his wage earning capacity at the time of the Marine Terminal injury. All of the wage calculations in this paragraph are reflected in EX 3.

With reference to the nature and extent of Claimant's disability, again, the answer to this question varies with each injury. With respect to the March 25, 1994 injury, SSA notes that the Claimant's earnings increased rather than decreased following that injury. The Claimant's highest earnings in his lifetime were in the calendar year 1995 (EX 2, EX 3), even though he was off work six weeks during that year due to a hernia surgery. (EX 13 at 219) The Claimant reached his maximum medical improvement following the March 25, 1994 injury on April 28, 1995 per the report of Dr. John Dunn (EX 11 at 150-151), and he continued to work in his regular job without wage loss. The August 6, 1996 injury had a different result. Following that injury, the Claimant never again returned to the wages he was making prior to that injury. He reached his maximum medical improvement on March 17, 1997 per the report of Dr. John Dunn (EX 11 at 163-164), and not only did his actual wages go down, his wage earning capacity went down even further. Claimant credibly testified before me that he was able to earn those wages only by working with extreme pain and with high dosages of narcotic medications. SSA contends that the Claimant sustained at least a 50% permanent loss of wage earning capacity following the August 6, 1996 injury. Following October 14, 1997, the Claimant finally had the surgery that he had been seeking for almost a year prior to that injury. SSA contends that the October 14, 1997 incident was a temporary aggravation of Claimant's pre-existing condition. Claimant is still treating for that pre-existing condition and is

currently receiving temporary total disability compensation at the maximum rate of \$835.74 per week. (EX 7 at 96)

With reference to medical benefits, two types of treatment are recommended for the Claimant at this time - orthopedic and psychiatric. SSA denies liability for both. Although SSA has been paying the orthopedic expenses, SSA contends that these expenses are the result of the natural progression of the Claimant's underlying degenerative disk disease and should be paid by Claimant's non-industrial insurance carrier. SSA is not paying for the psychiatric condition for three reasons. First, the Claimant has a long history of depression preceding even the first injury involved in this case. (EX 12 at 168) Second, the Claimant has more severe non-industrial stressors than industrial stressors, such as the terminal illness of his wife and other serious medical conditions, one of which has resulted in the recommendation that his colon be removed. Finally, the Claimant was diagnosed and began treatment for depression related to back pain after the Marine Terminal injury and before the SSA injury. If the depression requires treatment that would not otherwise be required but for the Claimant's industrial injuries, the responsibility for that treatment should lie with Marine Terminals and its insurance carrier.

At its most simple level the argument of SSA/Homeport is an attempt to reduce their liability by allocating responsibility for Claimant's back condition between several employers. The Benefits Review Board has recently rejected a challenge to this "all or nothing" allocation of liability of the last employer rule, holding that the last responsible employer is responsible for all disability compensation and medical care and treatment. **Justice v. Newport News Shipbuilding and Drydock Company**, 34 BRBS 97,100 (2000). Moreover, the Ninth Circuit, in whose jurisdiction this case falls, has also held that the aggravation rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time. **See, e.g., General Ship Service v. Director, OWCP**, 938 F.2d 960 (9th Cir. 1991).

The totality of this closed record leads ineluctably to the conclusion that Claimant's October 14, 1997 injury aggravated, accelerated, exacerbated or combined with his pre-existing orthopedic and psychological problems, thereby resulting in a new and discrete injury at that time. Accordingly, as SSA was the Employer on the risk under the Act, and as Homeport was its Carrier at that time, SSA/Homeport are responsible for all of the benefits awarded herein with reference to Claimant's October 14, 1997 injury.

With reference to the Responsible Employer, it is important to note that this is not an occupational disease claim where the last

employer usually is responsible for the entire loss. Under the Longshore Act, however, a Claimant may have successive industrial injuries and receive concurrent disability awards. **See e.g., Brady Hamilton Stevedore Co. v. Director, OWCP**, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995). In this case, the Claimant has had successive industrial injuries, and Marine Terminals is responsible for at least a portion of the wage loss and need for medical treatment.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work at the current time as a longshore worker. The burden thus rests upon the Employers to demonstrate the existence of suitable

alternate employment in the area. If the Employers do not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has not become permanent as he requires additional medical care and treatment. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large

number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

While SSA/Homeport has voluntarily agreed to pay, subject to reimbursement if another employer is found to be responsible, for Claimant's orthopedic medical expenses relating to his low back problems, resulting from his three maritime injuries, neither Employer has agreed to authorize and/or pay for Claimant's psychological counseling, and it is this lack of treatment that has delayed Claimant's recovery and a return to the **status quo ante** that would permit him to return to work.

Thus, I find and conclude that Claimant has not yet reached maximum medical improvement and that issue will be resolved in a Section 22 proceeding at some time in the future. Claimant then is entitled to an award of temporary total disability benefits commencing on October 15, 1997.

Claimant also seeks an award of partial disability for his loss of wage - earning capacity resulting from his August 5, 1996 injury, Claimant alleging that he has established a **prima facie**

claim therefor by a simple comparison of his average weekly wages for his August 5, 1996 injury and his October 14, 1997 injury. While Marine/Majestic contend that the 1996 injury was a temporary aggravation and did not result in any permanent partial disability, I disagree because I find Claimant's thesis and evidence in support thereof to be most probative and persuasive. While Marine/Majestic contend that there is no medical evidence to support such claim, Claimant submits, and I agree, that the totality of this closed record leads to the conclusion that Claimant's low back problems since 1986 were aggravated by his March 25, 1994 and August 5, 1996 injuries, resulting in a demonstrated loss of wage-earning capacity.

While Marine/Majestic point out the procedural status of the leading case dealing with successive injuries, *i.e.*, **Brady Hamilton Stevedore Company v. Director, OWCP**, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995), is somewhat different as **Brady-Hamilton** involved two separate proceedings, at which the respective obligations of each employer were determined, I do not find such distinction to be persuasive. Claimant has filed three claims for his injuries and the three claims were consolidated for one hearing in the interests of judicial efficiency.

The record reflects that Claimant was paid temporary total disability benefits, at the maximum weekly compensation rate as his average weekly wage was \$1,955.01 as of August 5, 1996. He returned to work on September 20, 1996 as part of a trial return to work to see if he could tolerate the vigorous work of a longshoreman. Dr. Dunn performed a disability examination on March 18, 1997 and the doctor opined that Claimant could continue working as long as he watched himself and avoided any work that aggravated his lumbar problems.

However, Claimant continued to do work that, in hindsight, he should have avoided and while Marine/Majestic contend that Claimant, to a certain extent, deliberately subjected himself to further aggravation, the Board has held that there no such defense is available to the Employer in a longshore claim, unless within the provisions of Section 3(c). In this regard, *see Hallford v. Ingalls Shipbuilding Division/Litton Systems, Inc.*, 15 BRBS 112 (1982).

Accordingly, Claimant is entitled to an award of temporary total disability benefits from August 5, 1996, if he has not been paid for the date of the injury, through September 19, 1996, temporary partial benefits from September 20, 1996 through March 17, 1997 and permanent partial benefits from March 18, 1997 through October 13, 1997, the date of the third maritime injury before me. However, Claimant has not calculated those benefits and requests that such benefits should be calculated on a week by week basis by comparing his PMA wages (CX 49 at 307, *et seq.*) to his average weekly wage of \$1,955.01.

This Court has reviewed those PMA wages and they reflect the following:

	<u>TIME PERIOD</u>	<u>WAGES</u>	<u>VAC/HOL. PAY</u>
1)	09/20/96 through 03/17/97	\$44,694.80	\$4,474.56
	$\$44,694.80 \div 27 \text{ weeks} = \$2,056.60$		
2)	03/18/97 through 10/13/97	\$39,855.34	\$0.00
	$\$39,855.34 \div 27 \text{ weeks} = \$1,476.12$		

A review of Claimant's wage records reflects that Claimant worked steadily from September 20, 1996 through March 17, 1997 (CX 49 at 307-311), that he worked six days during most of those weeks (thereby establishing that he is a six-day-a-week worker, that he worked eight, nine and ten hours during most of those days and that his diligent work activities resulted in an average weekly wage of \$2,056.60 and an absence of any loss of wage-earning capacity during those twenty-six weeks. While there may be such loss during one or more particular weeks, when isolated from the rest, Claimant's brief does not specifically identify those weeks. Thus, Claimant may discuss any such week(s) with counsel for Marine/Majestic and voluntarily resolve such issue. In the alternative, Claimant may submit such week(s) to this Court as part of a timely filed **Motion For Reconsideration** and the issue will be further discussed after receiving comments from opposing counsel. Claimant may also submit any such week(s) to the District Director for her consideration in view of the geographic proximity of the parties in the Seattle area.

However, with reference to the claim for permanent partial disability benefits, Claimant's wage records are representative of his wage-earning capacity and they clearly reflect a post-injury wage-earning capacity between March 18, 1997 and October 13, 1997 of \$1,476.12, thereby resulting in a loss of wage-earning capacity of \$478.89, and I so find and conclude.

Accordingly, Claimant is entitled to an award of benefits for such period of time and an appropriate order will be entered herein.

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on March 17, 1997 and that he was permanently and partially disabled from March 18, 1997 through October 13, 1997, at which time he was forced to discontinue working as a result of his work-related injury on October 14, 1997, as discussed above.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). Accordingly, this Administrative Law Judge should include the weeks of vacation/holiday pay as time which claimant actually worked. **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan, supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone, supra**. If Section 10(a) cannot be applied, the second method for computing average weekly wage, found in Section 10(b), must be used if there is evidence as to the wages earned by a comparable employee. **Cf.**

Newpark Shipbuilding & Repair, Inc. v. Roundtree, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds**, 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree, supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

A. March 25, 1994 injury with Stevedoring Services of America.

At the time of the March 25, 1994 injury, Claimant was an "identified casual" longshoreman, with no union status. His earnings for the twelve months before March 25, 1994 were \$24,068.86. He worked 110 days that year, not enough to utilize Section 10(a) of the Act. **Matulic v. Director, OWCP**, 154 F.3d 1052, 32 BRBS 148 (CRT)(1998). Using Section 10(c), his earnings divided by 52 yield an average weekly wage of \$462.86.

B. August 5, 1996 injury with Marine Terminals Corporation

For the twelve months before August 5, 1996, Claimant worked 265 days. (CX 49 at 301-307) This exceeds the multiplier of 260

that is utilized in calculating the average weekly wage for a five-day worker. 33 USC §910(a). Therefore, the multiplier of 300 (used for a six-day worker) should be utilized for a Section 10(a) calculation. (As long as the employee works more than 75% of the applicable number of days of the measuring year, this is the presumptively correct method of calculation. **Matulic, supra**, 151.) Dividing his earnings of \$89,800.23 by 265, multiplying by 300 and dividing by 52 yields an average weekly wage under Section 10(a) of \$1,955.01, and I so find and conclude.

C. October 14, 1997 injury with Stevedoring Services of America

Claimant's average weekly wage for this injury would depend on the answer to two questions:

1. Whether the second injury on August 5, 1996 caused any permanent impairment. If not, then his average weekly wage for the third injury on October 14, 1997 should be calculated by reference to the twelve months he worked before the August 5 injury, utilizing Section 10(c). This twelve months is the most representative of his earning capacity, since he was working full time and was just about to become "A" registered.

2. However, if it is found that his August 5, 1996 injury did cause permanent impairment and he is given an award for that injury, then his average weekly wage for the third injury should be calculated as of the date that he reached maximum medical improvement for the second injury. As I have already concluded that Claimant reached maximum medical improvement on March 18, 1997, then his wages for the thirty (30) weeks from that date to October 14, 1997 divided by 30, total \$1,259.16, and I so find and conclude.

Accordingly, the benefits awarded herein shall be based upon the respective average weekly wages of \$1,955.01 and \$1,259.16.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17

BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant's entitlement to benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held

that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant timely advised the Employers of his work-related injuries and requested appropriate medical care and treatment. However, while SSA/Homeport have paid certain compensation and medical benefits, neither Employer has authorized appropriate psychological counseling. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, SSA/Homeport shall authorize, pay for and furnish such reasonable and necessary medical care and treatment in the diagnosis, evaluation and treatment of Claimant's lumbar and psychological problems between March 25, 1994 and August 14, 1996 and on and after October 14, 1997 through the present and continuing.

Marine/Majestic are responsible for Claimant's medical expenses relating to his lumbar and psychological problems between August 5, 1996 and October 13, 1996, pursuant to the so-called "last employer" rule.

As a claim for medical benefits is never time barred, SSA and Marine are responsible for those medical expenses that arise while they are on the risk under the Act, as specifically found above.

With reference to Claimant's need for psychiatric treatment and counseling, Claimant should be given the opportunity to pursue the psychiatric treatment that both Dr. Hamm and Dr. Walker have recommended. The fact that he may have had pre-existing psychological problems is not determinative. If a work injury aggravated, accelerated or combined with these pre-existing problems, the entire condition is compensable. **Kelley v. Bureau of National Affairs**, 20 BRBS 169 (1988).

As Dr. Sandra Walker reported in her August 24, 1999 letter, it would be an oversimplification to say that Claimant's personal losses are the sole reason he needs psychiatric treatment. (CX 28 at 246) In order to treat Claimant's chronic pain, it is necessary to address many associated factors, both work-related and non-work related. Dr. Hamm noted in 1997, before the third injury, that Claimant's pain from his back injuries, combined with other stressors in his life, were contributing to his chronic major depressive disorder. (CX 30 at 112, EX 25 at 29) In September, 2000, after examining Claimant, Dr. Hamm reported that Claimant said that the grief from the loss of his wife had been a problem, but then more recently that living with chronic pain had been the main problem (CX 23 at 376) and that it is also possible that his back pain made him less capable of dealing with the other stressors in his life. (EX 25 at 30) Dr. Hamm felt that in September 2000, Claimant still had chronic depression and he believes that it is "likely" there is some relationship between Claimant's need for psychiatric treatment and his back injuries at work. (EX 25 at 30) "He seemed to have done fairly well with his mood until his physical health started to decline." (EX 23 at 378) In his deposition, Dr. Hamm stated that it appeared that when Claimant's back was bothering him, he was more likely to report depression. (EX 25 at 29) "I think that the pain that he has from his back problems makes his depression worse. It is connected. ... It's one of the factors that makes it difficult for him to overcome depression and it also probably magnifies his depression." (EX 25 at 31)

Other Unrelated Medical Conditions

The record reflects that Claimant has suffered from various pre-existing non-industrial medical conditions such as ulcerative colitis. These conditions have no bearing on this case. Dr. Dunn stated in his deposition that the ulcerative colitis was not of any significance in the claim, and said this was a "strong answer." (RX 26 at 27-28) Claimant testified that his colon problems cleared up when he eliminated dairy products in his diet, and his colon is now "excellent." (TR 150) His kidney stone problem resolved when he quit drinking coffee. (TR 149) Dr. Dickson's opinion that "a substantial part of his symptomatology is probably related to factors other than injury... or his physical condition" (EX 24 at 24), is not relevant, so long as some of his problems are attributable to the work injury. Dr. Dickson also testified that he could not say to a reasonable degree of medical probability that none of the three injuries had any relationship to Claimant's back pain. However, as that last opinion was not expressed to a reasonable degree of medical certainty, I find and conclude that those other medical conditions of the Claimant are not related in any way to the three injuries joined herein as those are personal illnesses and as they were not aggravated, accelerated or exacerbated either by any of those three injuries or by any of the Claimant's working conditions, and I so find and conclude.

Responsible Employer

The "last responsible rule" has already been extensively discussed above and, at this point, I reiterate that Marine/Majestic are responsible for paying Claimant the appropriate total and partial disability benefits, as well as the reasonable and necessary medical expenses for Claimant's lumbar and psychiatric problems, between August 5, 1996 and October 13, 1997. I also reiterate that SSA/Homeport are responsible for the reasonable and necessary medical expenses for Claimant's lumbar and psychiatric problems between March 25, 1994 and August 4, 1996 and on and after October 14, 1997, as well as the appropriate temporary total disability benefits due thereafter until further **ORDER** of this Court. All of the above medical expenses are subject to the provisions of Section 7 of the Act.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or

partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), *rev'd and remanded on other grounds sub nom. Director v. Berstresser*, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), *aff'd*, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, *supra*, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, *supra*.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, *supra*.

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

The Section 8(f) issue herein is moot at this time as the permanent benefits awarded Claimant herein do not exceed 104 weeks. Accordingly, that issue will be discussed/resolved at another time.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employers and their Carrier (Respondents). Claimant's attorney has not submitted her fee application. Within thirty (30) days of the receipt of this Decision and Order, she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be

affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

As I have found both Employers responsible for benefits herein, this could be a situation where each Employer should bear part of the attorney fee to be awarded herein in a supplemental decision. The fee petition should attempt to segregate out and itemize, as nearly as possible, the legal services with reference to the three injuries involved herein as I have awarded medical benefits for all three injuries and compensation benefits for the last two injuries.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Marine Terminals and Majestic Insurance Company (Employer II) shall pay to the Claimant compensation for his temporary total disability from August 5, 1996 through September 19, 1996, based upon an average weekly wage of \$1,955.01, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Employer II shall pay to Claimant compensation for his permanent partial disability, between March 18, 1997 and October 13, 1997, based upon the difference between his average weekly wage at the time of the injury, \$1,955.01, and his wage-earning capacity after the injury, \$1,476.12, as determined in the pertinent section herein, as provided by Sections 8(c)(21) and 8(h) of the Act.

3. SSA/Homeport Insurance Company (Employer I) shall pay to the Claimant compensation for his temporary total disability from October 14, 1997 through the present and continuing, based upon the average weekly wage of \$1,259.16, such compensation to be computed in accordance with Section 8(b) of the Act.

4. Interest shall be paid by Employer I and Employer II on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. Employer I shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his work-related injuries joined herein.

6. Employer I shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, **i.e.**, his lumbar and psychiatric problems, between March 25, 1994 and August 4, 1996 and on and after October 14, 1997, subject to the provisions of Section 7 of the Act.

7. Employer II shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, **i.e.**, his lumbar and psychological problems, between August 5, 1996 and October 13, 1996.

8. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, apportioned to the best of her ability, as discussed above, sending a copy thereof to counsel for Employer I and Employer II, who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference held before the District Director.

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl